

BRB No. 92-2184

PAULINE G. ALLEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
_____ INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION AND ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-1832) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a tacker for employer for approximately two years from 1945 to 1947 where she was exposed to loud workplace noise. An audiogram administered on March 14, 1989, was interpreted by Dr. Stanfield as indicative of a .93 percent binaural hearing loss. On April 18, 1989, claimant filed a claim for occupational hearing loss benefits under the Act based on the results of this audiogram. On April 21, 1989, employer filed its notice of controversion. On April 11, 1990, the case was referred to the Office of Administrative Law Judges for a formal hearing. On April 1, 1991, while the case was pending before the administrative law judge, employer informed claimant that liability for claimant's medical expenses was accepted. As of the time of the hearing, however, the cause of claimant's hearing loss, claimant's entitlement to compensation, and employer's liability for a \$650 hearing aid which claimant had procured from Beltone remained in dispute.

In his Decision and Order, the administrative law judge, crediting claimant's testimony and the medical opinion of Dr. Stanfield, determined that claimant had a .93 percent work-related noise-induced binaural hearing loss. Noting that under *Ingalls Shipbuilding, Inc. v. Director*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), a retiree's occupational hearing loss benefits must be compensated pursuant to 33 U.S.C. §908(c)(23) (1988), the administrative law judge determined that claimant sustained no compensable disability because claimant's .93 percent binaural impairment equates to a zero percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*.¹ Finally, the administrative law judge determined that, although employer accepted liability for claimant's medical benefits on April 1, 1991, employer's liability for the "Miracle Ear" hearing aid which claimant obtained from Beltone remained in dispute. Although employer argued that it was not liable for this hearing aid because claimant had chosen Dr. Stanfield as his initial free choice of physician and had not requested authorization for a change in physicians, the administrative law judge found that pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), employer was required to furnish claimant with a hearing aid and that claimant should not be required to purchase this device through any particular audiologist. Viewing the \$650 requested for this expenditure as reasonable, the administrative law judge ordered employer to reimburse claimant for this cost. In addition, he ordered employer to reimburse claimant for the cost of the initial hearing evaluation and awarded claimant reasonable and necessary future medical benefits.

Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level, requesting \$702.25 representing 6.15 hours of attorney time billed at \$115 per hour. Employer filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's objections to the fee request, reduced the hourly rate to \$110, and disallowed .25 hours of the time claimed. Accordingly, he awarded claimant's counsel a fee of \$649 representing 5.9 hours of attorney services at \$110 per hour. Employer appeals the fee award made by the administrative law judge on various grounds, incorporating the objections it made below into its brief on appeal. Claimant has not responded to employer's appeal.

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that as claimant received no compensation, there was no successful prosecution of the claim. We need not address this fee liability argument relating to Section 28(a), as this case is governed by Section 28(b). 33 U.S.C. §928(a), (b). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. *See Tait*

¹No party challenges the administrative law judge's calculation of claimant's hearing impairment pursuant to 33 U.S.C. §908(c)(23)(1988). Cf. *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S Ct. 692, 26 BRBS 151 (CRT) (1993) (benefits for all occupational hearing loss are to be calculated pursuant to 33 U.S.C. §908(c)(13)).

v. Ingalls Shipbuilding, Inc., 24 BRBS 59 (1990). In the present case, at the time the case was referred to the administrative law judge employer controverted the claim in its entirety. On April 1, 1991, however, while the claim was pending before the administrative law judge, employer conceded liability for claimant's medical benefits. In addition, claimant prevailed on the contested issues of causation and employer's liability for the hearing aid which claimant obtained from Beltone. The Board has held that an award of medical expenses constitutes additional compensation sufficient to support a fee award payable by employer under Section 28(b).² *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Morgan v. General Dynamics Corp.*, 16 BRBS 336, 339 (1984). Thus, we reject employer's argument that it is not liable for an attorney's fee. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64 (1991)(decision on remand).

We also reject employer's argument that the fee awarded by the administrative law judge is excessive. Although employer maintains that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee award, we decline to address these arguments which have been raised by employer for the first time on appeal.³ *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge did consider the nature of the case in determining that an hourly rate of \$110 was reasonable and appropriate. While employer also argues that the \$110 hourly rate awarded is excessive and asserted below that an hourly rate of \$65 to \$70 would be more appropriate, employer's challenge to the hourly rate determination must fail;

²This case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). In *Baker*, the court recognized that a claimant may be entitled to medical benefits even though he has no ratable impairment. Nonetheless, upon the employer's challenge to the award of medical benefits and the resultant attorney's fee, the court reversed the award of benefits and the award of an attorney's fee where claimant Buckley failed to present evidence of the need for future medical treatment. In the instant case, claimant sustained a measurable impairment but was not awarded compensation because of the application of 33 U.S.C. §908(c)(23)(1988). Moreover, employer does not challenge the administrative law judge's award of medical benefits. On these facts, claimant herein, unlike claimant Buckley in *Baker*, established a basis for the fee in the award of medical benefits made by the administrative law judge. See *Biggs v. Ingalls Shipbuilding Inc.*, 27 BRBS 237 (1993)(Brown J., dissenting), *aff'd in part. part mem. sub nom. Ingalls Shipbuilding Inc. v. Director, OWCP [Biggs]*, 46 F.3d 209 (5th Cir. 1993).

³Employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished) in support of its assertion that the fee awarded is excessive. The Board has held that unpublished cases should not be cited or relied on by the parties as they lack precedential value. See *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

employer has not established an abuse of discretion made by the administrative law judge in this regard. *See Maddon*, 23 BRBS 55 (1989); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds).

Employer also argued below that the .5 hours which counsel requested on March 13, 1991, for writing a letter to claimant to advise her of her upcoming deposition was excessive and not separately billable because of its clerical nature. The administrative law judge, however, reasonably determined that this service was not clerical but reduced the one-half hour claimed for this service to one-quarter of an hour consistent with employer's objection. We decline to further reduce his rational determination. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge